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No. 84-15

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOWARD YOUNG SIGLER, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel because of his attorney's previous representation of a prosecution witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1984, and a petition for rehearing (Pet. App. B) was denied on May 7, 1984. The petition for a writ of certiorari was filed on July 6, 1984.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on 11 counts of illegally dispensing controlled substances, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a three-year term of special parole, and was fined a total of $100,000.

Briefly summarized, the government's evidence at trial established that between December 1982 and February 1983, petitioner, a practicing orthopedic surgeon, prescribed controlled substances to two female patients, Virginia Sparks and Susan Cannon, in exchange for sexual favors (Pet. App. A2; see Tr. 80-81, 87, 101-103, 136-137, 139-147). During direct examination by the prosecution, Sparks testified that she first had visited petitioner in 1977 for treatment for feigned injuries to her neck and back resulting from an automobile accident (Pet. App. C1-C3; Tr. 61-62, 65). During cross-examination, Ronald Waldie, one of petitioner's two trial counsel, conducted further inquiry concerning this incident. In response to Waldie's questioning, Sparks stated that, after she and her husband had come to Waldie's office, he had referred her to petitioner for treatment in connection with the submission of a fraudulent insurance claim (Pet. App. C3-C4; Tr. 93-94). Waldie then sought to elicit admissions from her that she had lied to petitioner, both on that occasion and during her visits in December 1982, conerning the nature and extent of her injuries (Pet. App. C5-C6; Tr. 96-97):

> Q Now, when you went to Dr. Sigler on December the 14th of 1982 you also told him that your neck and back was hurt, didn't you?
>
> A I — did I tell Dr. Sigler I was there for the old — for the old and back neck injuries, yes, sir.
>
> Q Old back and neck injury? So now you do recall you had a neck and back injury in the 1977 accident?
>
> A No, I don't say I recall. I said that I had one which wasn't true at that time and it isn't true at this time. I lied.
>
> Q You lied? Well, did you lie to him in 1977?

A Yes.

Q And now you have lied to him again in 1982?

A I didn't lie to him. He knew what I was there for. We were both grown adults. He knew why you sent me to him.

Q Did you lie to him — I didn't send you there in '82, did I?

A You sent me there in '77 for a fraudulent insurance claim.

Q All right. And you went there and you say you lied to him at that time?

A I didn't tell him anything. I just went there because you told me to and they gave me treatment. That is all I remember.

Q How did he come up with this neck, back and all this stuff?

A I guess for the insurance claim.

After this colloquy, Waldie continued what the court of appeals characterized as a "vigorious[]" cross-examination of Sparks (see Pet. App. A4). He questioned Sparks concerning her extensive use of drugs over a four-year period and her plans to obtain drugs from a dentist (Tr. 115-116, 121-125); her reasons for visiting petitioner in December 1982 (Tr. 97-100); the circumstances of the visits (Tr. 101-105, 116-121); whether she had not misled petitioner into believing she was in pain (Tr. 97, 125-126; see also Tr. 95-96); the details of her agreement with the police to assist in the investigation against petitioner in exchange for leniency in the prosecution of charges then pending against her (Tr. 107-109); petitioner's apparent reluctance to prescribe the drugs (Tr. 112); her prior inconsistent statement to the grand jury (Tr. 112-114); her thefts to obtain money

to buy drugs (Tr. 115); her prior criminal record (Tr. 115); and her subsequent unsuccessful attempts to obtain drugs from petitioner (Tr. 123).

Following Sparks' testimony, the district court conducted a side bar conference and inquired concerning Waldie's previous representation of Sparks (Pet. App. C6-C8; Tr. 160-162). Waldie responded (Pet. App. C7; Tr. 160):

> Well, I didn't know I even represented her until last Friday when I talked to her on the phone but I didn't actually represent her. I represented [her husband] and she was in the car with him.

Waldie also told the court that he did not feel uncomfortable with regard to the situation that Sparks had raised and that he had advised the prosecutor of his prior contact with Sparks. Waldie also expressed the opinion that there was no basis for his disqualification from continued representation of petitioner or for the declaration of a mistrial (Pet. App. C7-C8; Tr. 160-161).

The court of appeals affirmed petitioner's conviction (Pet. App. A1-A7). It rejected petitioner's claim that, because of Waldie's prior dealings with Sparks, he labored under a conflict of interest. The court reasoned that even if Waldie actually represented Sparks in 1977, it was on a civil matter that was "completely unrelated" to the facts on which the indictment was based (*id.* at A4). Moreover, the court concluded that contrary to petitioner's contention, Waldie had vigorously cross-examined Sparks, specifically attacking her credibility on the ground that she had lied in 1977 concerning the nature and extent of her injuries (*id.* at A4-A5).

ARGUMENT

1. Petitioner contends (Pet. 5-10) that he was denied the assistance of conflict-free counsel at his trial. In particular, he maintains that, as the result of Waldie's previous dealings with Sparks and her accusations during questioning,

Waldie was precluded from challenging her testimony that he and petitioner had engaged in a scheme with her in 1977 to file a fraudulent insurance claim. This fact-bound claim does not warrant further review.

As the court of appeals observed (Pet. App. A4 n.2), when questioned by the trial judge, Waldie denied that he had represented Sparks and stated that he had actually represented her husband following the automobile accident in 1977 (Pet. App. C7; Tr. 160). He further explained that he had had no contact with Sparks since the time of the accident (Pet. App. C7; Tr. 161). Moreover, as the court of appeals observed (Pet. App. A4), the accident in 1977 was unrelated to the facts on which petitioner's indictment was based. These factors considerably attentuate the claim of a conflict of interest arising out of an asserted prior representation of Sparks.

Moreover, this Court held in *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980), that "until a defendant shows that his counsel actively represented conflicting interests, he has not established a constitutional predicate for his claim of ineffective assistance." Therefore, "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Ibid.* There is no basis for such a finding unless a defendant —

> can point to 'specific instances in the record to suggest an actual conflict or impairment of [his] interests' * * * [A defendant] must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.

Barham v. *United States*, 724 F.2d 1529, 1532 (11th Cir. 1984), quoting *United States* v. *Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983). See also *Sullivan* v. *Cuyler*, 723 F.2d 1077,

1089 (3d Cir. 1983) (opinion on remand). Petitioner has not made that showing.

It was during direct examination by the prosecutor, not during cross-examination by Waldie, that Sparks stated that she had first contacted petitioner in 1977 in connection with a feigned injury, which she described as a "fraudulent" endeavor (Pet. App. C2-C3; Tr. 65). Waldie therefore was not responsible for the jury's hearing of Sparks' testimony regarding the fraudulent circumstances of her introduction to petitioner. To be sure, Sparks accused Waldie in off-hand comments during cross-examination of having been involved in a scheme to defraud an insurance company at that time. But the present record does not establish that there was any substance to Sparks' accusation that Waldie actually participated in a fraudulent scheme. An unsolicited and unsupported accusation of defense counsel by a witness on a matter not directly related to the charges against the defendant does not in itself give rise to a conflict of interest. Nor is it clear that these comments about Waldie regarding another incident six years earlier would have incrementally damaged petitioner in the jury's mind. For these reasons, the claim of a conflict of interest in this case is one that would more appropriately have been raised on collateral attack under 28 U.S.C. 2255, rather than on direct appeal, so that petitioner, represented by new counsel, could have developed an evidentiary record concerning the necessary factual predicates of his conflict of interest claim.

Petitioner also errs in contending (Pet. 4, 8-9) that following Sparks' statements about the 1977 incident, Waldie avoided further cross-examination on the subject. In fact, Waldie attempted to exploit to petitioner's benefit Sparks' testimony about the 1977 incident and to exonerate petitioner from any imputation of wrong-doing in connection with it. He elicited an admission from Sparks that she had lied to petitioner about her injuries in 1977 and that she told

him when she visited him again in 1982 that she was seeking medication for her old injuries (Tr. 96-97). Waldie also sought to establish that she in fact was injured in the 1977 accident (Tr. 113), that she did not pay petitioner following the insurance settlement on that occasion, and that petitioner's fee had been withdrawn (Tr. 121-122). In addition, as the court of appeals observed (Pet. App. A4), and as petitioner concedes (Pet. 8), Waldie also "vigorously" cross-examined Sparks on a number of other matters. See pages 3-4, *supra*. On the present record, then, it does not appear that Waldie was deterred in his cross-examination of Sparks or, accordingly, that his performance was "adversely affected" by the asserted conflict of interest. And to the extent Waldie did not press the 1977 matter further, the most natural explanation would appear to be that it would have been both unproductive and tangential, as well as potentially damaging to petitioner, if Sparks elaborated upon her accusations.

Nor is petitioner's claim of a conflict of interest in the circumstances of this case advanced by his assertion (Pet. 6-7) that Waldie was the only witness who could have rebutted Sparks' testimony about the 1977 incident but that he was unable to testify concerning Sparks' accusations because he was petitioner's attorney. Waldie in fact was not the only witness who could have rebutted Sparks' testimony. Petitioner himself obviously could have done so. Yet when petitioner testified, he did not address the 1977 incident. There is no indication that Waldie's decision not to question petitioner about that collateral matter (see Tr. 367) resulted from a conflict of interest, as petitioner speculates (Pet. 5). Waldie's decision is entirely consistent with a reasonable tactical judgment not to highlight the incident further and not to open a subject matter for the prosecutor to expolit on cross-examination relating to allegations of unrelated illegal conduct. Moreover, assuming that Sparks

was correct in her allegations that both petitioner and Waldie had engaged in fraudulent conduct in 1977, Waldie's position at trial — however reprehensible his past conduct — did not thereby conflict with that of petitioner.

It also is not irrelevant for present purposes that if Sparks' allegations were true, petitioner presumably knew of Waldie's illegal conduct when he chose to have Waldie represent him in this case. If so, we question whether petitioner should now be heard to complain that an impermissible conflict of interest developed when Sparks mentioned the prior transaction at trial. Once again, the absence of an evidentiary record on these matters — which were collateral to the issues at trial — is an additional reason why this is an issue that would more productively have been explored on collateral attack under 28 U.S.C. 2255 rather than on this direct appeal.

Finally, as the court below noted (Pet. App. A4), the only importance of Sparks' 1977 visit to petitioner for treatment was to provide background information with respect to how Sparks came to know petitioner. There is substantial reason to question whether the court would have allowed further extensive exploration into its allegedly illegal aspects. See Fed. R. Evid. 403, 404(b). It also appears from Waldie's statements during the ensuing bench conference that he may have had little independent recollection of his previous dealings with Sparks (Pet. App. C7-C8; Tr. 160-161).[1]

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[1]Petitioner also contends (Pet. 7) that Waldie could not have testified about the 1977 incident without withdrawing as counsel. However, Rule 3.7(a)(3) of the American Bar Association's Model Rules of Professional Conduct does not require withdrawal where disqualification would result in substantial hardship for the client. Here, where the issue arose mid-trial, it is possible that the court would have permitted Waldie to testify without requiring him to withdraw.

2. Petitioner also contends (Pet. 9-12) that the district court had an affirmative obligation to make an inquiry of Waldie concerning the possibility of a conflict of interest and that it failed to fulfill that obligation. However, following Sparks' testimony, the district court in fact *did* inquire of Waldie concerning the details of his previous dealings with Sparks and asked whether those dealings were of such a nature as to require his disqualification (Pet. App. C7-C8; Tr. 160-161). Waldie replied that he had not actually represented Sparks and asserted his belief that his contacts did not constitute a basis for disqualification (*ibid.*). Since "trial courts [must] necessarily rely in large measure upon the good faith and good judgment of defense counsel," who is "in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial" (*Cuyler* v. *Sullivan*, 446 U.S. at 347), the district court's decision not to proceed further at that time does not on the present record furnish a basis for reversal of petitioner's conviction.[2]

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[2]During the colloquy, petitioner's other attorney assured the court that, should it be necessary to cross-examine Sparks further, he could conduct the questioning (Tr. 160). Where a conflict of interest claim is made, the availability and participation of co-counsel unencumbered by the alleged conflict is a significant factor in resolving the issue. Cf. *United States* v. *Carter*, 721 F.2d 1514, 1538 (11th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

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